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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Do the Supreme Court decisions in *Edgington v. United States* and *Michelson v. United States* require in a federal criminal trial an instruction that *character evidence when considered with all the other evidence in the case may alone raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

II. Is it error in a federal criminal trial for the District Court to fail to charge the jury as to the purpose, function and effect of character evidence upon the Government's burden of proof, specifically that *character evidence when considered with all the other evidence in the case may raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

III. Is it error in a federal criminal trial and a Denial of Due Process under the Fifth Amendment for the District Court to instruct the jury that character evidence may not defeat a finding of guilt beyond a reasonable doubt, without also instructing that character evidence when considered with all the other evidence in the case may also raise a reasonable doubt, when such a balanced instruction is requested by the defendant?

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2. The questions presented as to whether the "alone" charge is required and whether the purpose, function and effect of character evidence must be charged are extraordinarily important questions dealing with the administration of criminal justice in the Federal Courts, and can only be resolved by the Supreme Court.	11

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(a) Inasmuch as character evidence has the potential of arising at most every federal criminal trial in the United States, the jury charge as to the consideration which the jury should give such evidence has the potential of affecting the outcome in all federal criminal trials at which such evidence is offered, and as a result, the lack of uniformity in the law as to its purpose, function and effect in the jury charge results in a discriminatory treatment of criminal defendants not only from Circuit to Circuit, but from Judge to Judge. 11

(b) The issues are ripe and there is little likelihood that the Circuits will resolve the conflict both among and within themselves at any near time in the future. 13

3. The District Court's refusal to charge as to the "alone" instruction, and at the same time fail to charge as to the purpose, function and effect of character evidence, specifically that such evidence when considered with all the other evidence may raise a reasonable doubt, was contrary to both *Edgington* and *Michelson* as well as the law of every Circuit as to the required charge regarding character evidence. 17

(a) The Supreme Court should exercise its supervisory powers to review the District Court's charge regarding character evidence which is clearly contrary to all federal precedent 17

(b) The District Court not only failed to give the required charge as to the purpose, function and effect of character evidence contrary to all federal precedent, but further charged that character evidence

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could not defeat a finding of guilt beyond a reasonable doubt, without also balancing the charge with an instruction that character evidence may also raise a reasonable doubt when considered with all the other evidence, and as such the court should exercise its supervisory powers to correct this clear break with federal law. ... 20

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TABLE OF AUTHORITIES CITED

CASES

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Oertle v. United States, 370 F.2d 719 (1966), *cert. denied*, 387 U.S. 943, 87 S.Ct. 2075, 18 L.Ed. 2d 1329 (10th Cir. 1966). 8,10,15

Peterson v. United States, 268 F.2d 87 (10th Cir. 1959) (en banc). 9,14

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United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), *cert. denied sub nom., Mittleman v. United States*, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed. 2d 523 (1961). 10,12,16

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United States v. Fayette, 388 F.2d 728 (2d Cir. 1968). 9,10

United States v. Fontenot, 483 F.2d 315 (5th Cir. 1977). 9,18

United States v. Frischling, 160 F.2d 370 (3rd Cir. 1947). 9,18

United States v. Kabot, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed. 2d 550 (1961). 10,12,16

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United States v. Klass, 166 F.2d 373 (3rd Cir. 1948). . 9,18

United States v. Lachman, 469 F.2d 1043 (1st Cir. 1972), *cert. denied*, 411 U.S. 931, 93 S.Ct. 1897, 36 L.Ed. 2d 390 (1973). 9

United States v. Lewis, 157 U.S. App. D.C. 43, 482 F.2d 632 (D.C. Cir. 1973). 9

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United States v. Minieri, 303 F.2d 550 (2d Cir. 1962), *cert. denied*, 371 U.S. 847, 83 S.Ct. 79, 9 L.Ed. 2d 81 (1962). 8

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United States v. Wooden, 137 U.S. App. D.C. 1, 420 F.2d 251 (D.C. Cir. 1969). 9

Villaroman v. United States, 87 U.S. App. D.C. 240, 184 F.2d 261 (D.C. Cir. 1950). 9

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CONSTITUTIONAL PROVISION, STATUTE AND RULE

Constitution of the United States, Fifth Amendment, Due Process Clause 2

Title 26 U.S.C. Section 7203 2

FRAP 35(a) 3

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Irwin A. Schiff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals For The Second Circuit entered in this case on January 28, 1981.

OPINION BELOW

The judgment of the United States Court of Appeals for the Second Circuit was rendered in open Court and without written opinion on January 28, 1981. A copy of the oral opinion rendered at the time of judgment is in the attached Appendix, 22a. The Second Circuit's reversal of petitioner's original conviction is cited as *United States v. Schiff*, 612 F.2d 73 (1979) and is in the attached Appendix, 24a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 28, 1981. Petitioner's "Petition For Rehearing with Suggestion for Rehearing En Banc" was timely filed and denied on April 21, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

> Amendment V: No person shall be. . . . deprived of life, liberty, or property without due process of law. . . .

STATUTE INVOLVED

Title 26 U.S.C. Section 7203:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalites provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

FRAP 35(a):

> **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

STATEMENT OF THE CASE

An information was filed in the District of Connecticut, at Bridgeport, against petitioner on April 18, 1978 charging him with two Counts of willful failure to file personal income tax returns for the calendar years 1974 and 1975 pursuant to Title 26 U.S.C. Section 7203. Petitioner was convicted by a jury on both Counts before the Honorable T.F. Gilroy Daly, and his conviction was reversed and a new trial granted by the United States Court of Appeals For The Second Circuit in *United States v. Schiff*, 612 F.2d 73 (1979). On remand, at Hartford, petitioner was again convicted by a jury on both Counts, this time before the Honorable T. Emmet Clarie, Chief Judge. Petitioner was sentenced to one year imprisonment and a $10,000 committed fine on each Count, execution of sentence to be suspended on each Count after six (6) months. The sentence on each Count to run concurrently. Timely appeal was again taken to the United States Court of Appeals. Petitioner's conviction was affirmed in open Court and without written opinion on January 28, 1981. See attached Appendix, 41a. Petitioner filed a timely "Petition for Rehearing with Suggestion for Rehearing En Banc" which was denied on April 21, 1981. See attached Appendix, 42a.

Petitioner's case turned upon his defense at trial that he in good faith actually believed that the purported returns he filed

in 1974 and 1975 were his lawful returns for the calendar years in question, that he had in all respects believed he had completely complied with the law, and as such was not willful. This was the only issue at trial, and was recognized as such by the Court of Appeals in reversing his first conviction, where the Court stated the "sole issue" was "his good faith as a defense to the charge of willfulness". *Id.*, at 79.

To support his defense of good faith, petitioner took the stand, and testified extensively that he actually believed that his purported filings complied with the law and as such were his lawful returns for the years 1974 and 1975. To buttress the credibility of his testimony, and to establish that it was unlikely that a man of petitioner's character would commit the offense of which he was accused, petitioner offered character and reputation evidence to establish his honesty and truthfulness, including a Connecticut Superior Court Judge who had known petitioner for 40 years, his rabbi of 25 years, and a personal friend of 34 years. (A-1123-1140).[1] With the exception of petitioner's own testimony, and the exhibits he offered through his testimony, petitioner's character evidence was the only other evidence offered in his defense. (A-578-1140).

In written instructions timely submitted to the District Court, petitioner requested an instruction that character evidence when considered with all the other evidence, may itself raise a reasonable doubt in the mind of the jury. (A-92). See Attached Appendix, 43a. The District Court did not so charge, but rather gave an instruction of his own, which failed to charge that character evidence when considered with all the other evidence may "itself" or "alone" raise a reasonable doubt, or for that matter at all stating the purpose, function and effect of character evidence—that character evidence when considered with all the other evidence may raise a reasonable doubt, without the "itself" or "alone" reference. Further, that this failure combined

[1] "A" refers to the Joint Appendix filed by petitioner in his appeal below to the United States Court of Appeals For the Second Circuit, the Judgment of which is sought to be reviewed here, and the numerical designation represents the page number therein.

with the District Court's reference that character evidence may not defeat a finding of guilt beyond a reasonable doubt, misleadingly implied that character evidence could not raise a reasonable doubt and also indicated that character evidence might only be considered in doubtful cases when guilt beyond a reasonable doubt has not been found. The District Court charged:

> Normally in criminal cases the character and the reputation of the accused is not an issue in the first instance. The Government has no right to initially introduce any evidence in a criminal case that an accused has a bad reputation, however, the accused may, if he so desires, bring his own character and reputation into the case. He has the right, a right which in this case the accused exercised, to present witnesses to testify as to his general reputation for truthfulness and honesty in the community. Such evidence of his good character and reputation for truthfulness and honesty in the community wherein he resides and in his profession should be considered by you with the other evidence in the case. If a man by a life of good conduct has gained the esteem of those with whom he's been associated, and has thus attained a fair and honorable reputation for truth and honesty in the community in which he lives, or where he works, it is proper that it should count in his favor in his hour of need. But if you believe from all of the evidence that the accused is guilty beyond a reasonable doubt, you should not hesitate to convict him, notwithstanding that he may have heretofore borne a good name and reputation; neither should you fail to give due consideration to his good reputation, if such he had, when you weigh the evidence against him. However, you know without reminder from me that men of good reputation may do wrong and commit crimes, although such men are less likely to do so than those who have no reputation to lose. So you, the jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. (A-1308-1309).

This charge was duly objected to (A-1333-1334, 1343). The point was further raised in a timely filed motion for new trial (A-1440). See attached Appendix, 44a. The motion was denied by the District Court (A-1442).

On appeal before the Court of Appeals, petitioner called the Court's attention to the severe split in the Circuits as to whether the Supreme Court decisions in *Edgington v. United States*, 164 U.S. 361, 17 S.Ct. 72, 41 L.Ed. 467 (1896), and *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), require the "alone" charge as to character evidence at a federal criminal trial, or simply a charge stating that character evidence when considered with all the other evidence may raise a reasonable doubt, without further stating that it "alone" or "itself" might do so. Petitioner then informed the Court of Appeals that the District Court had complied with neither standard and the charge was against the unanimous weight of authority in the federal Courts, and was particularly unfair due to the importance of the character evidence at petitioner's trial and the limited issue involved—petitioner's subjective good faith. It was further noted that the failure to properly charge as to the effect of character evidence upon the Government's burden of reasonable doubt, and the affirmative charge that character evidence should not defeat a finding of guilt beyond a reasonable doubt, mistakenly implied that character evidence could not raise a reasonable doubt and that it might only be considered in doubtful cases.

Petitioner then filed a timely "Petition For Rehearing with Suggestion For Rehearing En Banc" requesting that the 2nd Circuit resolve the conflict among several of its panel decisions, which mirrored the general conflict among the various federal Circuits, and decide whether the "alone" charge is required under *Edgington* and *Michelson*—i.e. that character evidence when considered with all the other evidence may "alone" or "itself" raise a reasonable doubt—or whether the Circuit simply interprets *Edgington* and *Michelson* as requiring a charge that character evidence when considered with all the other evidence may raise a reasonable doubt, without the additional reference that it "alone" may do so. Petitioner again emphasized that the

District Court's charge failed under either view and was a complete break with all federal precedent, both within and outside the Circuit. Despite the open conflict within the Circuit, as there is among the Circuits, the Petition For Rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. THERE CURRENTLY EXISTS A CONFLICT BOTH AMONG AND WITHIN THE FEDERAL CIRCUITS AS TO WHETHER THE "ALONE" CHARGE IS REQUIRED AND THE CONFLICT IS BASED UPON DIVERGING OPINIONS AMONG AND WITHIN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF TWO SUPREME COURT DECISIONS.

There is currently a split both among and within the federal Circuits as to whether the introduction of character evidence by a defendant in a federal criminal trial requires a jury charge that such evidence when considered with all the other evidence in the case may "alone" or "by itself" raise a reasonable doubt as to the guilt of the defendant. In effect, there is conflict within conflict. The dispute revolves around two Supreme Court decisions, *Edgington v. United States*, 164 U.S. 361, 366, 17 S.Ct. 72, 74, 41 L.Ed. 467 (1896) and *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 219, 93 L.Ed. 168 (1948). Citing *Edgington*, the Court in *Michelson, supra*, at 476, 69 S.Ct., at 219, stated:

> He [the defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. *Edgington v. United States*, 164 U.S. 361 17 S.Ct. 72, 41 L.Ed. 467.

The 10th Circuit in *Oertle v. United States*, 370 F.2d 719 (1966), *cert. denied*, 387 U.S. 943, 87 S.Ct. 2075, 18 L.Ed. 2d 1329 (1966), recognized the extraordinary mass division resulting from the inter and intra Circuit conflicts on the question, and identified the fountainhead from which has sprung this splintered precedent:

> It is significant that the Circuits have not been consistent in the interpretation of *Edgington* and the later case, *Michelson v. United States* (citation omitted). *Id.*, at 726.

Each of the eleven Circuits have considered the question, and the result has been two separate interpretations of the Supreme Court's decisions in *Edgington* and *Michelson*. The first, is that when character evidence is offered by a federal criminal defendant, the defendant is entitled to a jury instruction that character evidence when considered with all the other evidence may "alone" or "by itself" raise a reasonable doubt in the mind of the jury. The second interpretation is that the federal defendant is only entitled to a charge that character evidence when considered with all the other evidence may raise a reasonable doubt, without reference to "alone" or "by itself". Both views require that upon request, the federal criminal defendant is entitled to a jury charge explaining the effect character evidence has upon the Government's burden of proof.

Four Circuits have conflicting panel decisions as to whether the "alone" charge is required, and dicta in *United States v. Darland*, 626 F.2d 1235, 1238 (5th Cir. 1980) indicates there may be a problem in the Fifth Circuit as well.

Those Circuits which have panel decisions requiring the "alone" charge are the 2nd, 7th, 9th, 10th and District of Columbia:

2nd Circuit: *United States v. Minieri*, 303 F.2d 550, 554-555 (2d Cir. 1962), *cert. denied*, 371 U.S. 847, 83 S.Ct. 79, 9 L.Ed. 2d 81 (1962); *United States v. Cramer*, 447 F.2d 210, 219 (1971), *cert. denied*, 404 U.S. 1024, 92 S.Ct. 680, 30 L.Ed. 674 (1971).

7th Circuit: *United States v. Donnelly*, 179 F.2d 227, 233 (1950); *United States v. Wicoff*, 187 F.2d 886, 889 (1951).

9th Circuit: *Weedin v. United States*, 380 F.2d 657, 660 (1967).

10th Circuit: *Peterson v. United States*, 268 F.2d 87, 88-89 (1959) (en banc); *Bird City Equity Mercantile Exchange v. United States*, 338 F.2d 790, 791-792 (1964); *Johnson v. United States*, 269 F.2d 72, 74-75 (1959); *Hayes v. United States*, 227 F.2d 540, 544-545 (1955); *Greer v. United States*, 227 F.2d 546, 549 (1955); *Miller v. United States*, 120 F.2d 968, 972-973 (1941).

District of Columbia Circuit: *United States v. Lewis*, 157 U.S. App. D.C. 43, 482 F.2d 632, 637 (1973); *United States v. Wooden*, 137 U.S. App. D.C. 1, 420 F.2d. 251, 253 (1969); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261, 263 (1950); *United States v. Colbert*, 79 U.S. App. D.C. 261, 146 F.2d 10, 11 (1944).

Those Circuits which have panel decisions rejecting the "alone" charge but requiring a charge that character evidence when considered with all the other evidence may raise a reasonable doubt are the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th and District of Columbia:

1st Circuit: *United States v. Lachman*, 469 F.2d 1043, 1046 (1972), *cert. denied*, 411 U.S. 931, 93 S.Ct. 1897, 36 L.Ed. 2d 390 (1973).

2nd Circuit: *United States v. Fayette*, 388 F.2d 728, 737 (1968), *United States v. Lowenthal*, 224 F.2d 248, 249 (1955).

3rd Circuit: *United States v. Klass*, 166 F.2d 373, 378-380 (1948); *United States v. Frischling*, 160 F.2d 370 (1947); *United States v. Quick*, 128 F.2d 832, 835-837 (1942).

4th Circuit: *Mannix v. United States*, 140 F.2d 250, 253-254 (1944).

5th Circuit: *United States v. Fontenot*, 483 F.2d 315, 323 (1977).

6th Circuit: *Poliafico v. United States*, 237 F.2d 97, 114 (1956), *cert. denied*, 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed. 2d 597 (1957), *rehearing denied*, 353 U.S. 931, 77 S.Ct. 718, 1 L.Ed. 2d 725 (1957); *United States v. Brown*, 353 F.2d 938, 939-940 (1965).

8th Circuit: *Sunderland v. United States*, 19 F.2d 202, 215 (1927); *Black v. United States*, 309 F.2d 331, 343-344 (1962), *cert. denied*, 372 U.S. 934, 83 S.Ct. 880, 9 L.Ed. 2d 765 (1963).

9th Circuit: *Smith v. United States*, 305 F.2d 197 (1962), *cert. denied sub nom., Corey v. United States*, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed. 2d 124 (1962).

10th Circuit: *Oertle v. United States, supra*, at 726-727.

District of Columbia Circuit: *Marzani v. United States*, 83 U.S. App. D.C. 78, 168 F.2d 133, 139 (1948) *aff'd*, 335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431 (1948) (per curiam), *affirmance upheld on rehearing*, 336 U.S. 922, 69 S.Ct. 653, 93 L.Ed. 1075 (1949).

Note that in the 10th Circuit, the issue was resolved en banc, in favor of the "alone" charge, only for a subsequent panel to raise a conflict. See *Peterson, supra*, and *Oertle, supra*.

Therefore, there are four Circuits which have internal conflicts. They are the 2nd, 9th, 10th, and District of Columbia. As was indicated earlier, dicta in the recent decision of *United States v. Darland, supra*, at 1238, may result in an eventual conflict in the 5th Circuit as well.

Bearing in mind, the internal conflicts in the 5th, 9th, 10th and District of Columbia, the Circuits among themselves would seem to divide as follows: **For:** 7th, 9th, 10th and District of Columbia. **Against:** 1st, 3rd, 4th, 5th, 6th and 8th. The 2nd Circuit is absolutely impossible to determine due to the number of conflicting opinions, and the Circuit's refusal to resolve the matter en banc.

2nd Circuit:

For: *United States v. Minieri, supra*, at 554-555; *United States v. Cramer, supra*, at 219; *United States v. Crosby*, 294 F.2d 928, 947-948, *cert. denied sub nom., Mittleman v. United States*, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed. 2d 523 (1961); *United States v. Kabot*, 295 F.2d 848, 855 (1961), *cert. denied*, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed. 2d 550 (1961).

Against: *United States v. Fayette, supra*, at 737; *United States v. Lowenthal, supra*, at 249.

Not only does there exist conflict among the federal Circuits, but within them. This conflict results from varying interpretations of two Supreme Court decisions, *Edgington* and *Michelson*. These are classic grounds underlying why the Supreme Court should exercise its jurisdiction and resolve the conflict, but they are only part of why the Supreme Court should grant the Writ of Certiorari.

2. THE QUESTIONS PRESENTED AS TO WHETHER THE "ALONE" CHARGE IS REQUIRED AND WHETHER THE PURPOSE, FUNCTION AND EFFECT OF CHARACTER EVIDENCE MUST BE CHARGED ARE EXTRAORDINARILY IMPORTANT QUESTIONS DEALING WITH THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE FEDERAL COURTS, AND CAN ONLY BE RESOLVED BY THE SUPREME COURT.

(a) INASMUCH AS CHARACTER EVIDENCE HAS THE POTENTIAL OF ARISING AT MOST EVERY FEDERAL CRIMINAL TRIAL IN THE UNITED STATES, THE JURY CHARGE AS TO THE CONSIDERATION WHICH THE JURY SHOULD GIVE SUCH EVIDENCE HAS THE POTENTIAL OF AFFECTING THE OUTCOME IN ALL FEDERAL CRIMINAL TRIALS AT WHICH SUCH EVIDENCE IS OFFERED, AND AS A RESULT, THE LACK OF UNIFORMITY IN THE LAW AS TO ITS PURPOSE, FUNCTION AND EFFECT IN THE JURY CHARGE RESULTS IN A DISCRIMINATORY TREATMENT OF CRIMINAL DEFENDANTS NOT ONLY FROM CIRCUIT TO CIRCUIT, BUT FROM JUDGE TO JUDGE.

The Questions Presented as to whether the "alone" charge is required, and whether, at a minimum, a charge as to the purpose, function and effect of character evidence is required are extraordinarily important. The importance lies not in the fact that they are critical constitutional questions. Rather, 1) in the universality of their impact, specifically the great number of trials at which character evidence is offered and 2) the extraor-

dinary importance of their setting, the federal criminal trial, where the credibility and character of the defendant is a disputed and essential issue. Character evidence and its purpose, function and effect, is a common issue which is raised and resolved everyday in the federal District Courts. The concern here is that there is discrimination in the resolution of this common question which potentially can affect the rights of life, liberty and property, in unequal and varying ways, not due to the quality of the character evidence, but due to the particular Circuit, District or Judge. It is the sheer number of times that character evidence is presented at federal criminal trials, which makes the resolution of these questions so important. These questions deal with the everyday nuts and bolts practice of federal criminal law, and the recurring problem of the extent a defendant may benefit from character evidence. The threat that such benefit varies, often not due to the quality of the evidence, but the address of the courthouse and the name of the Judge, should not be permitted to continue.

At petitioner's trial, he not only did not receive the charge that character evidence when considered with all the other evidence may "alone" raise a reasonable doubt, but did not even receive a jury charge that character evidence when considered with all the other evidence may raise a reasonable doubt. Further, the District Court did charge that "if you believe from all the evidence that the accused is guilty beyond a reasonable doubt, you should not hesitate to convict him, notwithstanding that he may have heretofore borne a good name and reputation" (A-1309). Yet, other criminal defendants in the 2nd Circuit have received the "alone" charge specifically stating to the jury that such evidence when considered with all the other evidence may alone raise a reasonable doubt. See jury charges approved in petitioner's Circuit, *United States v. Kabot, supra,* at 855, n. 1, *United States v. Crosby, supra,* at 947–948, n. 28, and compare them with the charge received by petitioner. The *Kabot* and *Crosby* charges are reprinted in the appendix for the Court's convenience. See attached Appendix, 45a and 46a. When it is considered that the 2nd Circuit in *United States v. Schiff, supra,* termed petitioner's criminal intent "a key issue at the trial", *Id.*,

at 81, the discriminatory charge as to the character evidence received by petitioner is not only egregious in form but substance and cannot be said to have not been decisive in a case where the jury deliberated two days, announced at one point they were a hung jury (A-1404), and rendered their verdict only after the Allen charge (A-1404–1410). The concern is that this conflict in the law has been and will continue to be outcome determinative in many criminal trials.

It is impossible to know how many verdicts, or which ones, were or will be influenced. This does not mitigate the importance of the questions, but rather renders them even more urgent. Due to the frequency of character evidence, this impermissible affect upon the fair and equal administration of the criminal justice system looms ever greater, and the need to install a uniform rule more imperative.

A decision by the Supreme Court in this case would have an influence on almost all federal criminal defendants whose lives are forever influenced by the handful of hours spent in Court, and thereby take a further step toward a system of justice which renders such awesome decisions based upon the relevant individual facts under a uniform law, and not the varying geography.

(b) THE ISSUES ARE RIPE AND THERE IS LITTLE LIKELIHOOD THAT THE CIRCUITS WILL RESOLVE THE CONFLICT BOTH AMONG AND WITHIN THEMSELVES AT ANY NEAR TIME IN THE FUTURE.

The conflict below has over the years become more splintered with the passage of time. Whether the "alone" charge is required or simply a charge as to the function, purpose and effect of the character evidence—i.e. that character evidence may with all the other evidence raise a reasonable doubt—has revolved around the varying interpretations of two fairly old Supreme Court decisions. *Edgington* was decided in 1896 and *Michelson* in 1948. The passage of 33 years since *Michelson*, has resulted in a split among the Circuits and within at least four of them. The character evidence charges vary substantially from

Circuit to Circuit and within several Circuits. Further, the entire dispute revolves around two Supreme Court decisions, the interpretation of which, the Circuit Courts and various panels within individual Circuits, have not been able to agree.

In the 10th Circuit, the Court of Appeals sat en banc in *Peterson v. United States, supra,* where the defendant, as in petitioner's case, was defending solely under lack of willful intent under the tax statutes, to reconsider whether the "alone" charge was required, as the 10th Circuit had previously held on numerous occasions. The Court reaffirmed its earlier decisions and reversed the conviction for failing to so charge. The Court clearly stated the issue and its position:

> Relying on Edgington v. United States (citation omitted), this Court, in Miller v. United States, 10 Cir., 120 F.2d 968, 971–972, adopted the rule that when a defendant offers evidence of good character the jury must be instructed that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing. This rule was followed in Hayes v. United States, 10 Cir., 227 F.2d 540, 545, and Greer v. United States, 10 Cir. 227 F.2d 546, 549. Reliance on Edgington is said to be misplaced. The question of whether Edgington requires an instruction that character evidence alone may create a reasonable doubt or is satisfied by an instruction that the jury should consider such evidence along with all the other evidence in the case in determining guilt or innocence has produced a contrariety of opinion among the Circuits. While this conflict has not been resolved by the Supreme Court it is significant that in Michelson v. United States, supra, that court said, by way of dicta and in obvious reference to Edgington, that character evidence 'alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed'. This sustains the interpretation which has been placed on Edgington by the Miller, Hayes and Greer decisions of this court. *Id.*, at 88–89.

Even though the 10th Circuit en banc reaffirmed the requirement of the "alone" charge, a panel in the Circuit a short-time thereafter came down with a contrary decision. See *Oertle v. United States, supra*, at 726–727.

In the 9th Circuit, the Court in *Smith v. United States, supra*, at 205–207, relying on *Edgington* and *Michelson*, rejected the 10th Circuit's authority that the "alone" charge is required, and recognized as sufficient a charge that character evidence when considered with all the other evidence may raise a reasonable doubt. Yet, the same Circuit in *Weedin v. United States, supra*, at 660, subsequently held that the "alone" charge was required, citing both *Michelson* and 10th Circuit precedent.

The 2nd Circuit's position is unintelligible. A case may be selected for either point of view. While petitioner cited the *Minieri* and *Cramer* cases, the panel in petitioner's case cited *Fayette* in rendering judgment in open Court summarily affirming petitioner's conviction. Yet, petitioner's request for a Rehearing En Banc to resolve the conflict within the Circuit pursuant to FRAP 35(a), particularly considering the panel's failure to recognize or deal with the conflict, was denied. Inasmuch as the 2nd Circuit refuses to hear the issue en banc, there is little prospect that the conflict within the Circuit will be resolved anytime in the near future which absent action by the Supreme Court, will continue the discriminatory charges received by criminal defendants within the 2nd Circuit.

The conflicts in the 2nd, 9th and 10th Circuits involve varying decisions from the 1950's to the present, with no hint that a final resolution will be forthcoming. Passage of time has only created more doubt, and widened the split within the Circuits.

Nor obviously has the passage of time resulted in an evolution toward a uniform rule among the Circuits. In *Peterson*, the 10th Circuit noted in 1959, that the 7th and 10th Circuits followed the "alone" rule, while the 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and D.C. Circuits adopted only the charge that character evidence may raise a reasonable doubt. *Id.*, at 89 n. 3. Since then, a conflict has resulted in the 10th Circuit, the D.C. Circuit has adopted the "alone" charge, the 9th Circuit has in its most recent decision also adopted the "alone" charge, and the 2nd

Circuit has had four panel decisions which recognize the "alone" instruction, as well as one which takes a contrary position. A shift in four Circuits.

The result, of course, is that in those Circuits where the law is conflicting, such as the 2nd Circuit, the trial judge must decide the question not based upon Circuit precedent, but his own individual interpretation of *Edgington* and *Michelson*. The result is, and will continue to be, the disparity in the instructions that federal criminal defendants will receive as is evidenced from the charge received by petitioner and that received by the defendants in *Kabot* and *Crosby*. The same disparity exists from Circuit to Circuit due to the split among the eleven Circuits.

The bottom line is that the only hope for a uniform rule even within several of the Circuits, is Supreme Court action. The issue has been thoroughly considered for a number of years by the Courts of Appeals, each Circuit has addressed the questions, and therefore the matter may be considered timely for Supreme Court review. The conflict involved is not narrowly confined and will have immense future consequences due to the extaordinary number of federal criminal defendants who have been and will continue to be prejudiced due to the disparity in treatment on an issue which is common to the federal criminal justice system, and has the potentiality of arising at almost all federal criminal trials. This is not an issue which may only arise in a select and specified number of cases, as where a particular statute is charged or constitutional provision involved, but rather sweeps across the federal criminal justice system touching the trials and lives of most all involved.

Such a disparity on such a fundamental and recurring question that affects so many in proceedings of such great importance, if permitted to continue, may affect the public's confidence in the fairness and equality of the federal criminal justice system.

Therefore, uniformity is imperative. Inasmuch as the hub of this important and far-reaching conflict is the interpretation of two old Supreme Court decisions, the disparity in the treatment suffered by so many in such important matters may only be finally resolved by the Supreme Court.

3. THE DISTRICT COURT'S REFUSAL TO CHARGE AS TO THE "ALONE" INSTRUCTION, AND AT THE SAME TIME FAIL TO CHARGE AS TO THE PURPOSE, FUNCTION AND EFFECT OF CHARACTER EVIDENCE, SPECIFICALLY THAT SUCH EVIDENCE WHEN CONSIDERED WITH ALL THE OTHER EVIDENCE MAY RAISE A REASONABLE DOUBT, WAS CONTRARY TO BOTH *EDGINGTON* AND *MICHELSON* AS WELL AS THE LAW OF EVERY CIRCUIT AS TO THE REQUIRED CHARGE REGARDING CHARACTER EVIDENCE.

(a) THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO REVIEW THE DISTRICT COURT'S CHARGE REGARDING CHARACTER EVIDENCE WHICH IS CLEARLY CONTRARY TO ALL FEDERAL PRECEDENT.

While petitioner believes that the "alone" charge is the correct charge, at the petitioner's trial the District Court gave neither charge recognized by the eleven Federal Circuits. Not only did the District Court fail to instruct as to the "alone" element, but did not even charge the jury that character evidence when considered with all the other evidence may raise a reasonable doubt. The latter has been the bare minimum required by the Courts of Appeals in their interpretation of the requirements of the *Edgington* and *Michelson* decisions. In *Edgington*, the Supreme Court in considering the erroneous instruction given by the trial court that character evidence may only be considered if the mind of the jury "hesitates" as to guilt, stated:

> Whatever may have been said in some of the earlier cases to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, *the decided weight of authority now is that good character, when considered with other evidence in the case, may generate a reasonable doubt. Id.*, at 36, 17 S.Ct., at 74 (emphasis ours).

The instruction is recognized in every Circuit, and is the required charge in those Circuits which reject the "alone" charge:

3rd Circuit: *United States v. Frischling, supra,* at 370; *United States v. Quick, supra,* at 835–837; *United States v. Klass, supra,* 378–380.

4th Circuit: *Mannix v. United States, supra,* at 254.

5th Circuit: *United States v. Fontenot, supra,* at 323.

6th Circuit: *Poliafico v. United States, supra,* at 114.

8th Circuit: *Sunderland v. United States, supra,* at 214-215.

While the several Circuits are severely divided as to whether the "alone" charge is required, all the Circuits hold that a charge as to purpose, function and effect of character evidence is required, and when considered with all the other evidence may raise a reasonable doubt, and that such a charge is required in Edgington:

> the rule of the Edgington case, laying aside technical verbiage is this: That where evidence of good character is introduced on behalf of the defendant, he is entitled and especially if a request is made, to an instruction, setting forth (1) the purpose and function of such evidence, viz. to generate a reasonable doubt and setting forth (2) the probative status of such evidence, viz. that it is entitled to be considered whether the other evidence in the case be clear or doubtful; and setting forth (3) the possible effect of such evidence, viz. that when it is considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal. *Sunderland v. United States, supra,* at 215.

Therefore, the District Court failed to comply with either interpretation of this Court's decisions in *Edgington* and *Michelson,* contrary to all federal precedent in the Courts of Appeals.

The only issue at petitioner's trial was his alleged criminal intent—willfulness—whether he in good faith believed that his

purported 1974 and 1975 federal income tax returns complied with federal law. On this point, the whole trial focused, and the District Court permitted a mountain of evidence (See Printed Record below, "Appellant's Exhibits, Volumes I and II").

The 2nd Circuit in reversing petitioner's first conviction, termed it "a key issue at the trial", and held the offer of a television show "irreparably prejudiced" the defendant's case "on the sole issue left to the jury—his good faith defense in the charge of willfulness". *United States v. Schiff, supra,* at 79. The Government's prosecution theory was that petitioner and his claimed good faith beliefs were a "total fraud" (A-206), that he was running a "flim-flam" (A-935), and that petitioner's legal beliefs were not a good faith understanding of the law but a guise for selling seminars and lectures to the public and as such he was "fleecing the public" (A-1289-1290). Petitioner took the stand in his own defense, and while engaging in a self-examination of himself, asking his own questions and giving his own answers, the District Court would interrupt terming his testimony a "seminar" and "lecture" (A-584, 622, 784, 1095, 1102). To support his testimony that he acted in good faith, and that it was unlikely he would commit the crime of which he was accused, petitioner offered character testimony, including a Connecticut Superior Court Judge to testify as to his honesty and truthfulness. Outside of the petitioner's testimony and exhibits which were offered through his testimony, his character evidence was the only other evidence presented at his trial. The issue was the truthfulness of petitioner's testimony as to his claimed good faith belief that he had complied with the law. Based upon the issue, the 2nd Circuit's recognition of it as "a key issue at the trial", the Government's prosecution theory, the trial judge's comments as to petitioner's testimony, the District Court's total failure to comply with the current authority of any Circuit as to either of two views of *Edgington* and *Michelson* is completely unfair. Particularly in light of petitioner's requested instruction, submitted in writing and the Court's promise to charge in substance, which it did not do, imposed little burden upon the District Court to come within some recognized view of the law. There was no reason for the failure to do so, and the District Court's substantial departure from the minimum re-

quired, contrary to all federal precedent, in fairness ought to be corrected through the exercise of the supervisory powers of the Supreme Court.

(b) THE DISTRICT COURT NOT ONLY FAILED TO GIVE THE REQUIRED CHARGE AS TO THE PURPOSE, FUNCTION AND EFFECT OF CHARACTER EVIDENCE CONTRARY TO ALL FEDERAL PRECEDENT, BUT FURTHER CHARGED THAT CHARACTER EVIDENCE COULD NOT DEFEAT A FINDING OF GUILT BEYOND A REASONABLE DOUBT, WITHOUT ALSO BALANCING THE CHARGE WITH AN INSTRUCTION THAT CHARACTER EVIDENCE MAY ALSO RAISE A REASONABLE DOUBT WHEN CONSIDERED WITH ALL THE OTHER EVIDENCE, AND AS SUCH THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO CORRECT THIS CLEAR BREAK WITH FEDERAL LAW.

The District Court not only failed to charge that character evidence with all the other evidence may raise a reasonable doubt, but further charged that character evidence could not defeat a finding of guilt beyond a reasonable doubt, which without a balancing charge that character evidence could raise a reasonable doubt, misleadingly implied it could not raise a reasonable doubt or might only be considered in doubtful cases.

The District Court not only failed to properly charge as to the purpose, function and effect of character evidence, but charged in a manner which is contrary to it—that character evidence with all the other evidence may generate a reasonable doubt. The District Court not only failed to comply with all the federal precedent, but misleadingly charged contrary to the purpose of the instruction that he was required, and failed to give. This resulted in a denial of Due Process under the Fifth Amendment since the very reason why character evidence is offered—to generate a reasonable doubt—was not only not brought to the jury's attention, but further was contradicted by a charge that stated that character evidence couldn't defeat a finding of guilt

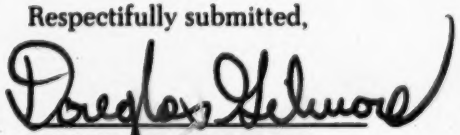
beyond a reasonable doubt, misleadingly implying that character evidence might only be considered where there was a question as to guilt—the very charge rejected by the Supreme Court in *Edgington*. As such, the Supreme Court should exercise its supervisory power to correct this clearly egregious error in the District Court's charge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents 1) a recurring federal question dealing with the administration of federal criminal justice upon which the federal Circuits are severely divided, the resolution of which turns upon the interpretation of two decisions of this Court and 2) which involves an important question of federal law that can only be settled by this Court.

The Petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit and that the Court summarily reverse the judgment of the Court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Respectfully submitted,



Dated: June 18, 1981

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Attorney for Petitioner,
Irwin A. Schiff

APPENDIX

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases)

United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. Docket No. 80-1297

IRWIN A. SCHIFF,
Defendant-Appellant.

Before:

HON. J. EDWARD LUMBARD, ELLSWORTH A. VAN GRAAFEILAND and AMALYA L. KEARSE, *Circuit Judges.*

New York, New York,
January 28, 1981

Statement made by the court at disposition of appeal in open court.

JUDGE VAN GRAAFEILAND

We commend you for an excellent and zealous argument on behalf of your client but we find no merit in your appeal, counsel.

On this appeal from a judgment convicting defendant on two counts of violating 26 U.S.C. § 7203 appellant asserts nineteen claims of error, including, among others, the contention that the district court emphasized certain parts of the charge by raising

his voice and apeaking in a staccato manner. We see no need to discuss these allegations individually since most of them are specious.

We are satisfied that appellant was given a fair trial. The district judge gave him the utmost leeway in presenting his case. He had two attorneys present to help him. There is absolutely no merit in his contention that he was forced to question himself. In referring to defendant's corporate tax return the Government was simply proceeding through a door that the defendant had opened and only commented on matters already before the jury.

The district court's charge on willfullness was correct. *See United States v. Ruffin*, 575 F.2d 346. So also was its charge concerning the Federal Reserve System and Federal Reserve Notes. *See United States v. Wangrud*, 533 F.2d 495. This Court has already disposed of appellant's Fifth Amendment argument on the prior appeal. *See* 612 F.2d at 77. Finally, the district court's charge on character evidence was in accordance with the law of this Circuit. *See United States v. Fayette*, 388 F.2d 727. The evidence of guilt was substantial, indeed overwhelming. The judgment is affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

No. 49,
Docket 79-1139.

IRWIN A. SCHIFF,

Appellant.

Douglas Gilmore, Westport, Conn. (Raymond W. Ganim, Stratford, Conn., of counsel), for appellant.

Richard Blumenthal, U.S. Atty., D. Connecticut, New Haven, Conn. (Michael Hartmere, Asst. U.S. Atty., New Haven, Conn., of counsel), for appellee.

Before LUMBARD, FRIENDLY and GURFEIN, Circuit Judges.

GURFEIN, Circuit Judge:

This case raises an issue never before considered in a federal court of appeals: the question of the admissibility in evidence in a jury trial on a criminal information of the videotape of a "talk show" which includes the opinions of unsworn strangers on the very issues before the jury. Appellant Irwin A. Schiff, a self-proclaimed iconoclast in the field of federal income taxation, and a prolix writer and lecturer on the subject of money, appeals from his conviction for willful failure to file personal income tax returns for the years 1974 and 1975. On April 18, 1978, a two-count information was filed against Schiff in the United States District Court for the District of Connecticut. The information charged Schiff with willful failure to file personal income tax returns in violation of 26 U.S.C. § 7203 for the calendar years

1974 and 1975.[1] After a trial before District Judge Daly and a jury, Schiff was found guilty on both counts. He was not charged with tax evasion, or obstruction of the Government in its efforts to collect taxes, omissions which will become material in the later discussions of relevancy.[2]

The principal claim on appeal is that the prosecution offered and the trial judge erroneously allowed in evidence, over objection, a videotape of Schiff's appearance on April 12, 1978 on Tom Snyder's NBC talk show "The Tomorrow Show" with Snyder and another guest.

We have viewed the videotape, as did the jury, and conclude that its admission was prejudicial and prevented Schiff from getting a fair trial. To understand why the United States Attorney should not have offered the videotape and why the judge should have refused to admit it we must describe the scene and define the issue.

Appellant was in the insurance business. He also fancied himelf a "constitutionalist", an extremist who reserved the right to interpret the decisions of the Supreme Court as he read them from his layman's point of view regardless of and oblivious to the interpretations of the judiciary. One can describe his attitude either as contumacious of governmental authority for the purpose of advancing the common weal, or as that of a clever faker who used his own distortions of the Constitution as a flimsy excuse for failing to pay his income taxes.

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[1] 26 U.S.C. § 7203 provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] On March 29, 1979 he was sentenced on each count to concurrent one year terms of imprisonment, with execution of sentence suspended after six months, six months probation, a fine of $10,000 and a special condition that probation would terminate upon payment of the fine.

In 1968 Schiff testified before the Senate Committee on Banking and Currency, registering his opposition to the removal of gold backing from Federal Reserve Notes. He wrote a book, first published in 1976, entitled *The Biggest Con: How the Government is Fleecing You*. The book includes such chapters as "U.S. Taxes—How They Have Converted the American Worker into a Serf" and "Taxes: The Arsenic in Our System." Schiff's views on taxation and on Social Security ("The World's Biggest Chain Letter") have appeared in other publications as well.[3] Beginning in 1977, Schiff conducted seminars on taxation.

So long as he made his attacks on the system in appearances before congressional committees, in articles in current periodicals, and even in rather evangelistic seminars on tax resistance, he was probably protected by the First Amendment. But he went further and he took his own advice literally.

Though he had filed personal income tax returns through 1973, disclosing his income, he decided for the calendar years 1974 and 1975 to file a "return" on the printed form 1040, but without disclosure of his gross income.

Accordingly, for each of these years, Schiff sent to the IRS a Form 1040, but on each form the title was altered to read "U.S. Individual Income Confession." Neither form contained any income data whatever. Instead, the various boxes were filled with assertions of assorted constitutional rights. Each form opened with the statement: "The 16th Amendment giving Congress the right to 'collect taxes on income' in no way abolished the rights secured to me by the 4th, 5th, 6th, 7th, 8th, 9th, 10th, & 13th (I will not be an involuntary serf of the Federal Government). . . ." In the signature box at the end of each form appeared the statement, "FOR SHAME! The I.R.S. is asking me to cast aside basic constitutional safeguards which as a patriotic citizen wishing to uphold and preserve the Constitution—I cannot do."

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[3] A reprint of an article by Schiff, entitled "The Biggest Con" and printed in *Argosy* appears in the *Congressional Record*, 94th Cong., 2d Sess., 122 CONG. REC. E4643-4645 (August 25, 1976). An interview of Schiff by the *Washington Star* regarding his views on Social Security is reprinted in the *Congressional Record*, 95th Cong., 1st Sess., 123 CONG. REC. S 19506-507 (December 15, 1977).

The 1974 submission was accompanied by a 36-page statement of alleged illegal and unconstitutional acts of the federal government with exhibits marked A through T. Schiff charged, *inter alia*, that the Government was guilty of illegally operating the Social Security "chain letter," counterfeiting coin in violation of article 1, section 8 of the Constitution, imposing involuntary servitude by means of an income tax and imposing an unauthorized tax by promoting inflation. The 1975 submission was accompanied by similar allegations.

Schiff's basic themes apparently were that Federal Reserve Notes are merely promises to pay since they were no longer required to be backed by any statutory gold reserve and that they are, hence, not "income"; and that the Sixteenth Amendment which permits the United States to lay a tax on income permits the Government only to tell him how much he owes but does not require him to compute the tax himself, with the corollary that compelling him to do so compels him to be a witness against himself in violation of the Fifth Amendment privilege against self-incrimination.

In 1976 Schiff filed Amended U.S. Individual Returns (Form 1040x) for the relevant years. The Amended Returns stated that Schiff could not compute and warrant the accuracy of the 1040s because he could not understand the complicated internal revenue laws and that "a law that is incomprehensible is invalid, unconstitutional and uninforceable [sic]." In 1977, he submitted additional 1040s for 1974 and 1975. He labeled each of these forms "PETITION FOR REDRESS OF GRIEVANCES" and stated on the forms, "I offer to amend or file again if you can show me how to do so without waiving my constitutional rights."

Each of these forms was accompanied by 100 pages of attachments consisting primarily of correspondence between Schiff and the Board of Governors of the Federal Reserve System as well as other federal agencies.

The Trial

The defense did not seriously contend that the conglomeration of papers filed along with the almost blank 1040 form constituted the tax return required by law. Instead appellant argued that he

could not constitutionally be compelled to file a return disclosing his income (which by his dialectic regarding bank notes never did become income) because of his privilege not to be a witness against himself in any event. Relying upon his own gloss on case law like *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927),[4] he asked the jury to find that his conduct was not willful in the criminal sense but was rather a good faith effort on his part to restore the Constitution to its rightful place.

There was no dispute that the defendant's wholly owned corporation, Irwin A. Schiff, Incorporated, filed corporate income tax returns for the years preceding 1974 and thereafter, and that the returns disclosed that the defendant had received, in 1974 and 1975, salary in the sum of Fifteen Thousand Six Hundred Dollars ($15,600), a sum sufficient to require the filing of a personal income tax return. 26 U.S.C. § 6012. The prosecution did not have to prove on this indictment that the defendant had any net income.

The case then was not one in which the defendant had failed to file any return that would alert the Government to his existence. This was a case where the Government was prosecuting criminally a person who disclosed his name and address, but who filed a form that was clearly inadequate under the statute and regulations. *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978); *United States v. Jordan*, 508 F.2d 750 (7th Cir.), *cert. denied*, 423 U.S. 842, 96 S.Ct. 76, 46 L.Ed.2d 62 (1975); *United States v. Daly*, 481 F.2d 28 (8th Cir.), *cert. denied*, 414 U.S. 1064, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973); *United States v. Porth*, 426 F.2d 519 (10th Cir.), *cert. denied*, 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53 (1974).

[1] Judge Daly knew that the issue for the jury was narrow: whether Schiff had acted in reasonable good faith. As he later

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[4] In *United States v. Sullivan, supra*, the Supreme Court held that income derived from business in violation of the National Prohibition Act was subject to taxation. Justice Holmes, writing for the Court, stated that the defendant could have exercised his Fifth Amendment right with respect to particular questions on the return, but could not "draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Id.* at 264, 47 S.Ct. at 608.

charged the jury, income received in Federal Reserve Notes is taxable income under the law and "a taxpayer's return [which] does not contain any information relating to the taxpayer's income from which the tax could be computed, is not a return within the meaning of the law." The judge also charged that the Fifth Amendment does not give a person the right to withhold the required information on the return concerning items the disclosure of which would not incriminate him or tend to incriminate him, and that even as to items which might incriminate him, he is required to state the *amount* of his income even if he does not reveal its illegal source. *See United States v. Johnson, supra*, 577 F.2d at 1311; *United States v. Egan*, 459 F.2d 997, 998 (2d Cir.), *cert. denied*, 409 U.S. 875, 93 S.Ct. 123, 34 L.Ed.2d 127 (1972). These instructions disposed of much of the case, however the issue of willfulness had to be left to the jury. *Cf. Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (charge of "presumptive intent" was error); *United States v. Murdock*, 290 U.S. 389, 393-94, 54 S.Ct. 223, 78 L.Ed. 381 (1933) (judge erred in expressing to the jury his opinion that the government had met its burden in proving willful failure to provide information regarding tax returns.)

[2] In a prosecution under § 7203, the Government need not produce direct evidence to show guilty intent; willfulness may be shown by means of circumstantial evidence alone. *United States v. MacLeod*, 436 F.2d 947, 949 (8th Cir.), *cert. denied*, 402 U.S. 907, 91 S.Ct. 1378, 28 L.Ed.2d 647 (1971). *See also* 10 Mertens, Law of Federal Income Taxation § 55A.09 (3d. ed.). In this case, the prosecution offered evidence that when Schiff's accountant reminded him of his obligation to file a personal income tax return for the calendar year 1974 the defendant objected to the preparation of the return and requested the accountant to voice the constitutional objections to the IRS, and that the accountant declined to do so. In addition, the Government showed that the defendant had filed corporate income tax returns for 1974 and 1975, that he had filed personal income tax returns for years prior to 1974, and that he had received income in 1974 and 1975. The Government also demonstrated that the defendant filed no return at all for 1977, and offered credible evidence that notices of failure to file in 1974 and 1975 had been

mailed to Schiff.[5] Furthermore, Schiff, in his purported return, stated that for personal reasons he had found it inconvenient to keep any clear records of his finances for the years in question.

[3] There was, accordingly, sufficient evidence of willfulness. *See United States v. MacLeod, supra,* 436 F.2d at 950; *United States v. Browney,* 421 F.2d 48, 50 (4th Cir. 1970). *Cf. United States v. Magnus,* 365 F.2d 1007, 1011 (2d Cir. 1966), *cert. denied,* 386 U.S. 909, 87 S.Ct. 856, 17 L.Ed.2d 783 (1967) (prior taxpaying history probative of willfulness).

Before the close of the prosecution case, therefore, the jury had heard testimony that the defendant was required to file a return showing his income, that he failed to do so for several consecutive years, and that his only excuse was, as developed in his statements attached to the 1040 forms in evidence, that the Government was wrong in requiring him to state his income. It was evident that the only defense left to the defendant was an assertion of his good faith.[6]

At this point, as part of its direct case, the Government offered in evidence a videotape of Schiff's appearance on April 12, 1978 on NBC's "The Tomorrow Show." The April 12 appearance was the second by Schiff; he had appeared several weeks earlier as

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[5] Although the Government contended that computer-generated notices that stated "Amended Return Filed—No Original" were sent to Schiff in 1975 and 1976, Schiff testified that it was not until 1977 that he received letters notifying him that his purported "returns" had been received but were legally inadequate.

[6] The judge ultimately charged:

> Even if you find that the defendant erroneously claimed his Fifth Amendment privilege, his conduct is not willful if you find that he acted in accordance with a good faith understanding of the law, based upon, among other things, a good faith reliance on judicial decisions of the federal courts or a good faith belief that the documents filed for the taxable years 1974 and 1975 constituted in each case an income tax return. The defendant's views need not be legally correct, just as long as he honestly believed and acted upon them in good faith.

See *United States v. Johnson, supra,* 577 F.2d at 1312.

The judge noted also that "the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns *which the defendant knew ought to be filed*" (emphasis added).

the only guest on the show and was invited to return after overwhelming viewer response.[7]

Testimony by a Government witness showed that on April 3, 1978 the producer of the show had telephoned Scott Waffle, an IRS Public Affairs official, and invited the IRS Commissioner to appear with Schiff on the television show. The Commissioner declined the invitation but the IRS provided the show instead with several Media Relations fact sheets regarding tax protesters, including one general fact sheet and one on constitution-based protests. The fact sheets apparently were not prepared specifically for the show but did reflect the views of the IRS. They were used by Snyder in his "talk" with Schiff.

In addition, the IRS videotaped the broadcast, and it is this videotape that was received in evidence.

On the April 12th show, Schiff shared the spotlight with the other guest, James Schnake. The host, Tom Snyder, introduced Schnake as a trial attorney specializing in civil and criminal fraud cases, and as a former chief of the criminal division of the United States Attorney's Office in Northern California. According to Snyder, Schnake was responsible for the prosecution of all criminal IRS cases in Northern California from 1957 through 1961.

In introducing the videotape prepared by the IRS, the Government did not contend that the statements made by Snyder and Schnake were relevant, but sought admission of the tape in its entirety solely for the purpose of showing Schiff's *responses*.

The defense objected to admission of the tape on the grounds of unfair prejudice and lack of authentication. The judge listened to the tape and then admitted it over these objections. Judge Daly summarized his position as follows: "Since the tape is offered for the statements made thereon by the defendant, and since I will charge the jury they may not consider it for any other purpose, it seems to me that a fair trial will not be

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[7] In his opening introductions, Snyder stated to Schiff, "As I say, Irwin, your visit here two weeks ago set off one of the biggest viewer responses we have ever had in this program."

imperilled by the admission of the tape." In addition, the court overruled the objection based on the alleged failure to authenticate, noting that there was no indication that IRS had altered the tape, though, in fact, the objection was based on a different ground—a failure to show completeness; the show had been prerecorded the night before it was broadcast and there was no proof that the IRS copy taken from the broadcast was not an already edited version of the actual prerecorded tape.[8]

At the close of the Government's case, the defense moved for a judgment of acquittal on the ground that the Government had not met its burden with respect to willfulness. The defense argued that no evidence of willfulness had been presented other than the videotape and that a 1978 videotape could not establish the existence of the requisite state of mind in the relevant period, 1974-1976. The District Court denied the motion, stating that there was ample evidence of intent, independent of the tape, to go to the jury. As we have indicated, we agree.[9]

"The Tomorrow Show" Videotape and Unfair Prejudice

Counsel have called our attention to no case in which a talk show on television involving a defendant has been allowed as evidence in a criminal case. We must now consider whether there was any legitimate purpose for its admission, and whether, if it was relevant, the statements made by the participants were not only inadmissible hearsay but also irreparably prejudiced the defendant on the sole issue left to the jury—his good faith as a defense to the charge of willfulness.

[4, 5] Obviously putting a dialogue on tape does not make it less subject to the Rules of Evidence. In the normal course of

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[8] Schiff admitted at trial that the tape, to the best of his recollection, was a "fair and actual portrayal of what [he] said on that night," but also noted that the show had been taped and rebroadcast, that there is an editor of the show, and that he couldn't say with "actual certainty" whether the videotape included "everything."

[9] The defense renewed its objections to the videotape at the close of the trial by means of alternate motions for a new trial or judgment of acquittal. The court emphasized that there had been no suggestion of Government impropriety in the preparation of the tape. Both motions were denied.

testimony with respect to admissions by a party, there is a witness on the stand whose other testimony and opinion are limited by the rules of relevance and competence and, in the case of expert opinion, by the usual tests of expert qualification. Even when a witness testifies that certain statements were adopted by the defendant, his testimony will normally be limited to those particular statements which it is asserted were adopted. It will not provide sanction for irrelevant or incompetent evidence. Here the television "witnessess" were neither sworn nor qualified as experts.

The threshold question is what the prosecution hoped the statements of Schiff on the videotape proved—in essence a test of relevancy. On appeal the Government asserts as justification that the jury was told that statements by Snyder and Schnake were to be considered "only for the fact that they were made, and that the defendant 'had certain responses or reactions.' " The Government stresses, moreover, that the court emphasized that "the reactions and responses themselves should be taken into account only if the jury concluded that any of them were relevant to the issue of intent."

One would have supposed that the prosecution would be able to point to particular responses by Schiff which could be categorized as admissions against interest on the issue of whether he really believed the legal arguments which he had addressed to the IRS. We have been pointed to no such admissions. On the contrary, the Government curiously points to the compatibility, rather than to the incompatibility, of appellant's statements on the television show with his statements on his "returns" as emphasizing rather the *consistency* of his beliefs and actions.

The television show was broadcast on April 12, 1978, two years after the last date on which the failure to file the 1975 return would have become a crime.[10] If considered nevertheless

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[10] In *United States v. Bourque*, 541 F.2d 290, 294 (1st Cir. 1976), the court noted:

> Just as subsequent conduct cannot relieve a taxpayer from criminal liability for failure to file tax returns on or before their due date [citations omitted] we do not think that subsequent events can transform an act of omission, innocent when it occurred, into a criminal act.

as a warning to *cure* an alleged criminal omission as evidence of good faith, the broadcast occurred only six days before the information was filed against appellant on April 18, 1978—hardly enough time to permit the taxpayer to change his return based on the purported warnings.

[6] We find no relevance on the grounds tendered by the Government, admissions against interest and warnings. Whether there was relevance in any part of Schiff's statements should have been determined by the judge and explained to the jury. Relevance is for the judge, not the jury. IX Wigmore on Evidence § 2550 (3d ed.). "Evidence which is not relevant is not admissible." Fed.R.Evid. 402.

Assuming however that some slight relevance can be found in some of Schiff's statements, we would not necessarily reverse because some irrelevant material was also received.

We reverse here because even if there was a minimal relevance, Rule 402, the prejudice so far outweighed it as to compel reversal. Under Rule 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

[7] The balancing process required by Rule 403 is entrusted, in the first instance, to the trial judge, *see* 1 Weinstein's Evidence § 403[02], and we have held that the trial judge's discretion should not be disturbed lightly. In *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978), we stated that "the preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally." 560 F.2d at 515. *See also United States v. Hernandez*, 588 F.2d 346 (2d Cir. 1978); *United States v. Rucker*, 586 F.2d 899 (2d Cir. 1978); *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977). In this case we have viewed the evidence represented by the videotape with our own eyes, and can judge the likely prejudice resulting from it as well as the trial judge. The test for exclusion under Rule 403 is that the danger of *unfair* prejudice outweighs the proba-

tive value of the evidence, and that test is clearly met in this case.

[8] The strident tone of the broadcast as enunciated by Snyder and the "tax expert" emphasized that appellant Schiff could not possibly believe his own arguments, the very issue left for the jury. *Cf. Apicella v. McNeil Laboratories*, 66 F.R.D. 78, 86 (E.D. N.Y.1975) (emphasizing potential unfair prejudice in admitting magazine article which dealt precisely with question that would be before the jury). These talk show adversaries predicted with assurance that on the facts known to them (the filing of "returns" which were not returns) appellant deserved to be convicted and, indeed, would certainly be convicted by any jury.

Toward the beginning of the broadcast, for example, Snyder stated to Schiff, "You know, you're going to wind up in Leavenworth one day, and you're going to wonder what the hell hit you"; and "We're here—you are here advising people to break the law," to which Schnake added, "I'm convinced he is." Of similar import is the following passage later in the show:

> Snyder: You're going to jail—do you know that?
>
> Schiff: Here's what—here's what it's—no I'm not.
>
> Snyder: You are going to jail.
>
> Schiff: I'm not going. I'm not going. This is what—it is what—listen to what the Supreme Court—
>
> Snyder: Do you think he's going to jail?
>
> Schnake: Yes—I think he is asking to go to jail and I think he's going to make it.[11]

When Schiff offered the argument that United States notes have not been "money" since the gold backing was abandoned,

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[11] The patent outshouting of Schiff, not giving him a chance to finish a sentence, was typical of much of the tape. *Compare United States v. Allison*, 474 F.2d 286, 287 (5th Cir. 1973), *cert. denied*, 419 U.S. 851, 95 S.Ct. 91, 42 L.Ed.2d 82 (1974), where the defendant "[i]n rapid-fire fashion . . . was several times asked complex, multifaceted questions . . . but was not given time to answer."

Schnake stated that "[m]en have gone to jail for espousing" that view.

Appellant was accused of a separate crime of practicing law without a license and, by clear implication, of obstructing the IRS in its collection of the revenue by his lectures to the taxpaying public.[12] Schiff was charged with neither of such offenses in the case on trial, and was thus impeached by the evidence of other offenses before he even took the stand. Schnake also was permitted to give the impression that when a person fails to file a return for three consecutive years, his willfulness is proved.

Thus, in addition to testifying with regard to Schiff's ultimate guilt, Schnake specifically addressed his comments to Schiff's good faith—a key issue at the trial. He offered his comments as an experienced lawyer who had both defended and prosecuted tax cases:

> Schnake: I've prosecuted tax cases, and I've defended people in Mr. Schiff's position.
>
> Now here's the procedure. In a failure-to-file case—and the return that he filed, if he has filed these empty returns with the Fifth Amendment stuff on it, have been held time and again to be no return at all. If he's done that since 1974—so that's 1974, '75 and '76—that is the magic three years that we always waited for on a man who was determined not to file. Give him three years, because then your proof of willfulness is all neatly laid out for you.[13]

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[12] Towards the end of the show, both Schnake and Snyder expressed concern that Schiff would lead others to violate the law:

Schnake: It is clear [Schiff] is advising people to violate the law in a most disastrous area . . .

Snyder: I don't want people watching the show [word unclear] to go to jail—simply do not file because they see you on television saying see—he says I don't have to—I'm not going to.

Schnake: Yes—okay—and this man is practicing law without a license.

[13] In *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952), the Supreme Court warned that a presumption permitting the jury to "assume intent from an isolated fact . . . would conflict with the overriding presumption of innocence." The Court noted that "[s]uch incriminating presumptions are not to be improvised by the judiciary." Surely they should not be improvised by Schnake.

Schnake further characterized Schiff's Fifth Amendment arguments as "word games" and stated that "the playing of word games is good evidence of lack of good faith. That's a principle in civil and criminal cases."[14] He was also permitted to state from his own experience that once a taxpayer's conduct has been evaluated through the administrative process and a criminal information filed against him, he is so obviously guilty that juries always convict.

Schnake noted:

> Juries bring in convictions on these statutes time and again—
>
> • • • • • •
>
> Since 1961, I would say [I defended] 15 [tax] cases for sure. And they ranged all the way from failure to file to tax evasion cases.
>
> • • • • • •
>
> Every—every one of these cases was either a conviction or a negotiated plea. . . . The cases, when they arrive in the hands of the U.S. Attorney are well-documented. And that's what you can do, except in the rare case.

This lesson from experience, a clearly excludable point, went a long way to destroying the presumption of innocence.

The additional vice was that when the videotape was shown to the jury the talk show people were, in effect, testifying as experts on the law of the forum. Such "expert" testimony is not admissible. *Marx & Co., Inc. v. Diners Club, Inc.*, 550 F.2d 505, 509–510 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977); *Loeb v. Hammond*, 407 F.2d 779 (7th Cir. 1968). As we said in *Diners Club*, "It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." As Professor McCormick notes, such testimony "amounts to no more than an expression of the [witness's]

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[14] The prosecutor may have compounded the prejudice inherent in Schnake's statement of this "principle" when he echoed Schnake's language by asking, "Mr. Schiff, aren't you playing with words again?"

general belief as to how the case should be decided." McCormick on Evidence § 12 at 27.

The videotape is further replete with prejudicial statements. Schnake several times referred to Schiff's arguments as "frivolous" and stated that Schiff is "trying to be very clever" and is "not up front."

This pre-judgment of the defendant's guilt, accompanied by fervid commentary that conveyed an air of incontestable truth, was presented to the jury before the defendant could testify on his own behalf. By the time he took the stand his credibility had been placed on the scale in as derogatory a fashion as is conceivable. The jury saw the defendant's views mocked and discredited as incredible before he could speak for himself. *See United States v. Check*, 582 F.2d 668, 684 (2d Cir. 1978).[15]

If we ask ourselves whether a judge would have allowed their live "testimony" if Snyder and Schnake had been called as witnesses, the answer is obvious. The law of evidence, no matter how liberally construed, allows no such impermissible tactic in a case with a single issue of intent.

The only justification offered by the Government for this unorthodox approach to the law of evidence is that a cautionary instruction is sufficiently curative even in so prejudicial a situation.

We do not doubt that in most cases a jury is capable of abiding by the court's limiting instructions. But to regard "cautionary instructions as talismans for the solution of any possible prejudice problem" is tantamount to "effecting a repeal of the prejudice rule, which by its terms concedes the possibility that the negative aspects of some evidence may simply be unmanageable for the factfinder regardless of instructions." Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 So. Cal.L.Rev. 220, 248–50 (1976). As *Bruton v. United States* recognized, cautionary instructions are not always the answer. 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *See*

[15] This is not, of course, to suggest that our result would be any different if the tape had been offered into evidence at a different time.

also United States v. Check, supra, 582 F.2d at 679. We do not believe that they were the answer here.

The content, timing and form of the evidence in question *combined* to create a prejudicial impact that far outweighed any conceivable probative value of the tape. We must conclude, therefore, that admission of the tape so prejudiced the defendant's case that a new trial is required.[16]

The Evidentiary Hearing

We hold that it was not error for the trial court to refuse a pretrial evidentiary hearing on the question of Schiff's assertion of his Fifth Amendment privilege. *See United States v. Jordan, supra,* 508 F.2d at 752.

[9, 10] While the question of constitutional privilege is one for the judge, Schiff does not advance any theory for the validity of his claim. On appeal, the appellant emphasizes that a person filling out a tax form is a "witness" for purposes of the Fifth Amendment. Clearly, this is the rule. *See Garner v. United States,* 424 U.S. 648, 656, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976); *United States v. Sullivan, supra.* But the Fifth Amendment privilege does not immunize all witnesses from testifying. Only those who assert as to each particular question that the answer to that question would tend to incriminate them are protected. As the Court observed in *Albertson vs. Subversive Activities Control Board.* 382 U.S. 70, 79, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), the questions in the income tax return are neutral on their face and directed to the public at large rather than to a "selective group" inherently suspect of criminal activities, *cf. Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968) (occupational and excise tax on gambling). Hence privilege may not be claimed against *all* disclosure on an income tax return.

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[16] In a subsequent trial, we do not preclude the cross-examination of Schiff, if he should take the stand, on statements he made on the talk show provided that improper and prejudicial statements made by Snyder and Schnake are not incorporated.

[11] While the judge's charge to the jury on the Fifth Amendment issue is somewhat unclear, a fair reading suggests that the judge did instruct, as a matter of law, that Schiff on his returns did not assert a proper claim of Fifth Amendment privilege.[17] The court specifically stated, "The law applicable to this case is that a taxpayer can comply with the tax laws and exercise his Fifth Amendment rights by listing the amount, not the source, of his income from illegal sources. . . ." That charge was correct.

Schiff did not list his income, nor is there any suggestion that an "illegal source" of income is involved. In fact, Schiff testified at trial that to his knowledge he had done nothing illegal during the years in question. Nor does appellant's brief suggest that there is any evidence outside the record that would have supported Schiff's exercise of a Fifth Amendment privilege if an evidentiary hearing had been held.

Finally, we note that in *Garner v. United States, supra*, the Supreme Court rejected an argument that a judicial hearing on a claim of privilege must precede a prosecution under § 7203. 424 U.S. at 664, 96 S.Ct. 1178.

The judgment of conviction is reversed and the cause is remanded for a new trial in accordance with this opinion.

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[17] In response to the defendant's motion for an evidentiary hearing, the trial judge agreed that the question of constitutional privilege was one he would have to decide. However, he determined that a pre-trial hearing was not required, and suggested that there would "in effect be an evidentiary hearing to the Court which will take place contemporaneously with the trial."

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January of one thousand nine hundred and eighty-one.

HON. J. EDWARD LUMBARD
HON. ELLSWORTH VAN GRAAFEILAND 80-1297
HON. AMALYA L. KEARSE

Circuit Judges,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. 80-1297

IRWIN A. SCHIFF,
Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO
Clerk

By: Arthur Heller
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day April, of one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 80-1297

IRWIN A. SCHIFF,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Irwin A. Schiff,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

vs. Criminal No. B-78-8

IRWIN A. SCHIFF

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

DEFENDANT'S REQUESTED INSTRUCTION #11

Mr. Schiff has presented character evidence of good reputation for truth and veracity, honesty and integrity, and as being a law abiding citizen. The jury should consider such evidence along with all the other evidence in the case. Such evidence of a defendant's good character, which is inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may itself give rise to a reasonable doubt in your mind, since the jury may believe it unlikely that a man with such a good character would commit the offense charged. 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 15.25.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

vs.

IRWIN A. SCHIFF

Criminal No. B-78-8
June 13, 1980

MOTION FOR NEW TRIAL

30. That the Court erred in its failure to instruct the jury that defendant's character evidence, which is inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may itself give rise to a reasonable doubt in the jury's mind as to the guilt of the defendant, and that such error was prejudicial in that the Court's instruction as to character evidence was not sufficiently explanatory of the effect character evidence has on the Government's burden of proof.

[855n1]

1. "Now, there has been testimony here to the previous good character of the defendant. You should consider such evidence of character together with all the other facts and all the other evidence in the case in determining the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character, does not justify or excuse the offense and you should not acquit a defendant merely because you believe he is a person of good repute. In may be that those with whom he had come into contact with previously have been misled and he did not reveal to them his true character."

[947n28]

28. "There has been testimony as to the previous good character of the defendant Mittelman. You should consider such evidence of good character, together with all the other facts and all the other evidence in determining his guilt or innocence. Evidence of good character may, in itself, create a reasonable doubt where, without such evidence, no reasonable doubt would exist.

"But if from all the evidence you are satisfied beyond a reasonable doubt that Mittelman is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit him merely because you believe that he has been a person of good repute.

"It may be that those with whom he had come in contact previously have been misled, or that he did not reveal to them his real character or acts.

"The testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion of Mittelman's character, nor is it to be taken by you as the witness' opinion as to his guilt or innocence.

"The guilt or innocence of Mittelman is for you, and you alone, to determine."

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2155

In the Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's instruction to the jury on character evidence was erroneous because it did not explicitly recite that such evidence, standing alone, could raise a reasonable doubt as to petitioner's guilt.

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Sunderland v. *United States*, 19 F. 2d 202 5

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2155

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Petitioner was tried before a jury and the district court issued no written opinion. The court of appeals affirmed petitioner's conviction by rendering an unreported oral opinion in open court (Pet. App. 22a-23a).

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1981 (Pet. App. 41a). A petition for rehearing was denied on April 21, 1981 (Pet. App. 42a). The petition for a writ of certiorari was filed on June 19, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

On April 18, 1978, a criminal information was filed against petitioner charging him with two counts of willfully failing to file federal income tax returns for the years 1974

and 1975, in violation of 26 U.S.C. 7203 (A. 22-23).[1] Following a jury trial, petitioner was convicted as charged. His conviction was reversed on appeal on grounds unrelated to the present petition, and the case was remanded for a new trial (Pet. App. 24a-40a).[2] After a second jury trial, petitioner was again convicted on both counts of the information (A. 1411). Petitioner was fined $10,000 and was sentenced to concurrent one-year terms on each count, with execution of the sentence of imprisonment suspended after service of six months (A. 1497).

At trial, the United States presented undisputed evidence that petitioner earned sufficient income to require the filing of federal income tax returns in 1974 and 1975 (A. 473-475, 480-481). The prosecution also introduced undisputed evidence that petitioner failed to file such returns.[3] Finally, the United States introduced evidence of the willfulness of petitioner's failures to file (A. 141, 154, 158, 197, 390-392). Petitioner defended by raising objections to the imposition of the federal income tax on wages and by contending that no one in the country is required to file an income tax return (A. 101, 111, 145). He also contended that if his "research" indicating that his protest filings adequately fulfilled his duty to file returns was incorrect, his mistake was in good faith and therefore not willful (A. 146). Petitioner finally introduced the testimony of character witnesses, consisting of his rabbi (A. 1123), a pharmacist and former fraternity brother (A. 1130), and a high school friend who became a local judge (A. 1134).

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[1]"A." refers to the appendix filed in the court of appeals.

[2]The reversal was based on the erroneous introduction at trial of a videotape of petitioner made during a television appearance.

[3]Petitioner filed so-called "protest" forms, which contained statements protesting the imposition of the federal income tax, but not information from which income or taxes could be determined (A. 160-169, 187-190).

Petitioner requested that the following charge be given to the jury concerning character evidence (A. 92):

> Mr. Schiff has presented character evidence of good reputation for truth and veracity, honesty and integrity, and as being a law abiding citizen. The jury should consider such evidence along with all the other evidence in the case. Such evidence of a defendant's good character, which is inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may itself give rise to a reasonable doubt in your mind, since the jury may believe it unlikely that a man with such a good character would commit the offense charged.

The trial judge instructed the jury as follows with regard to character evidence (A. 1308-1309):

> Normally in criminal cases the character and the reputation of the accused is not an issue in the first instance. The Government has no right to initially introduce any evidence in a criminal case that an accused has a bad reputation, however, the accused may, if he so desires, bring his own character and reputation into the case. He has the right, a right which in this case the accused exercised, to present witnesses to testify as to his general reputation for truthfulness and honesty in the community. Such evidence of his good character and reputation for truthfulness and honesty in the community wherein he resides and in his profession should be considered by you with the other evidence in the case.
>
> If a man by a life of good conduct has gained the esteem of those with whom he's been associated, and has thus attained a fair and honerable [*sic*] reputation for truth and honesty in the community in which he lives, or where he works, it is proper that it should

> count in his favor in his hour of need. But if you believe from all of the evidence that the accused is guilty beyond a reasonable doubt, you should not hesitate to convict him, notwithstanding that he may have heretofore borne a good name and reputation; neither should you fail to give due consideration to his good reputation, if such he had, when you weigh the evidence against him. However, you know without reminder from me that men of good reputation may do wrong and commit crimes, although such men are less likely to do so than those who have no reputation to lose.

Petitioner objected to the court's charge on character evidence (A. 1343).

On appeal, petitioner asserted 19 claims of error, including the court's character evidence instruction. The court of appeals found all the asserted grounds to be without merit and affirmed the conviction in open court (Pet. App. 22a-23a).

ARGUMENT

Petitioner's sole contention here is that the district court erred in refusing to instruct the jury that character evidence may by itself raise a reasonable doubt in the minds of the jury, and he asks this Court to resolve an asserted conflict between and within the circuits on this point.[4] This Court, however, has consistently denied certiorari on the many previous petitions that have been presented to it on this precise question.[5] For the reasons which follow, certiorari should be denied in this case as well.

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[4]Any inconsistency which may exist within a circuit should be resolved by the court of appeals rather than this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5]See, *e.g.*, *Oertle* v. *United States*, 370 F. 2d 719 (10th Cir. 1966) (en banc), cert. denied, 387 U.S. 943 (1967); *Smith* v. *United States*, 305 F. 2d 197 (9th Cir.), cert. denied, 371 U.S. 890 (1962); *Black* v. *United*

The overwhelming majority of federal appellate decisions hold that the jury need be told only, in effect, that evidence of good character must be considered with all the other evidence in the case and that guilt or innocence depends upon whether there is a reasonable doubt based upon all such evidence. See, *e.g.*, *United States* v. *Lachmann*, 469 F. 2d 1043, 1046 (1st Cir. 1972); *United States* v. *Fayette*, 388 F. 2d 728, 736-737 (2d Cir. 1968); *United States* v. *Quick*, 128 F. 2d 832, 835-837 (3d Cir. 1942); *Mannix* v. *United States*, 140 F. 2d 250, 253-254 (4th Cir. 1944); *United States* v. *Ramzy*, 446 F. 2d 1184, 1186-1187 (5th Cir. 1971); *United States* v. *Fontenot*, 483 F. 2d 315, 323 (5th Cir. 1973); *Poliafico* v. *United States*, 237 F. 2d 97, 114 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); *United States* v. *Brown*, 353 F. 2d 938, 940 (6th Cir. 1965); *Haffa* v. *United States*, 36 F. 2d 1, 5 (7th Cir.), cert. denied, 281 U.S. 727 (1929); *Black* v. *United States*, 309 F. 2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *Sunderland* v. *United States*, 19 F. 2d 202, 215 (8th Cir. 1927); *Smith* v. *United States*, 305 F. 2d 197, 205-207 (9th Cir.), cert. denied, 371 U.S. 890 (1962); *Oertle* v. *United States*, 370 F. 2d 719, 726; (10th Cir. 1966) (en banc), cert. denied, 387 U.S. 943 (1967); *Swingle* v. *United States*, 389 F. 2d 220, 222 (10th Cir.), cert. denied, 392 U.S. 928 (1968); *Marzani* v. *United States*, 168 F. 2d 133, 138-139 (D.C. Cir.), aff'd by an equally divided Court, 335 U.S. 895 (1948), aff'd by an equally divided Court on rehearing, 336 U.S. 922 (1949).[6]

States, 309 F. 2d 331 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *United States* v. *Cashio*, 420 F. 2d 1132 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970); *Poliafico* v. *United States*, 237 F. 2d 97 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

[6]Indeed, advising the jury that evidence of good character alone may create a reasonable doubt could give undue prominence to character evidence and mislead a jury into believing it must ignore other evidence and vote for acquittal if such character evidence is believed. See *United States* v. *Quick*, *supra*, 128 F. 2d at 836; *Mannix* v. *United States*,

These decisions are clearly consistent with this Court's previous decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948), both cited by petitioner. Nothing in those decisions mandates the jury instruction petitioner contends is required. In *Edgington*, this Court struck down a jury instruction because it directed the jury to consider character evidence only if the other evidence caused the jury to hesitate as to guilt. The Court held (164 U.S. at 366):

> the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Edgington stands for the proposition that character evidence must be *considered* by the jury, irrespective of whether the rest of the evidence raises a reasonable doubt as to guilt. The case did not, however, establish an absolute requirement that a jury be affirmatively instructed that character evidence alone may create a reasonable doubt. Rather, the Court's statement that character evidence might alone raise such a doubt merely explains why a jury must be instructed to consider character evidence in all cases. Similarly, *Michelson* v. *United States, supra*, a case dealing with the scope of cross-examination on character evidence, likewise does not compel an instruction that such evidence alone may raise a reasonable doubt. At most, it requires

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supra, 140 F. 2d at 253-254; *Smith* v. *United States, supra*, 305 F. 2d at 206; *Baugh* v. *United States*, 27 F. 2d 257, 261 (9th Cir.), cert. denied, 278 U.S. 639 (1928).

that such an instruction be given "in a proper case." *Michelson* v. *United States, supra,* 335 U.S. at 476.[7]

The instruction given in this case (A. 1308-1309) was clearly in line with the character evidence instruction found satisfactory by virtually every federal appellate court. It adequately conveyed to the jury that character evidence was offered to indicate petitioner was less likely to commit the offense charged, that the jury was required to consider such evidence with all the other evidence in the case, and that the jury's verdict was dependent on whether it believed there was a reasonable doubt concerning petitioner's guilt.[8]

Some decisions have held that the jury should be told that evidence of good character may alone be sufficient to raise a reasonable doubt. But this authority is far less extensive than petitioner suggests. For example, while cases in the Tenth Circuit formerly required an instruction that evidence of good reputation may itself raise a reasonable doubt (see, *e.g., Petersen* v. *United States,* 268 F. 2d 87 (1959) (en banc)), that court has subsequently made clear that it follows the position, maintained by the majority of other courts, that the instruction at issue is not rigidly

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[7]Thus, for example, if a trial incident or a remark by the prosecutor could lead the jury to believe such evidence could not, on its own, create a reasonable doubt, a corrective instruction would be appropriate and perhaps required. *Smith* v. *United States, supra,* 305 F. 2d at 206.

[8]Petitioner's contention (Pet. 17-21) that the instruction given in this case did not instruct the jury that character evidence, when considered with all the other evidence, may raise a reasonable doubt is simply not borne out by the facts. While the language of the instruction might not be cast in as favorable a light toward petitioner as he would like, a fair reading of the charge as a whole clearly indicates that the jury was instructed that it was required to consider the character evidence along with all the other evidence, and that such consideration was directed toward determining whether there was a reasonable doubt concerning guilt.

required. *Oertle* v. *United States, supra,* 370 F. 2d at 726-727 (en banc). *Swingle* v. *United States, supra,* 389 F. 2d at 222, a case which follows *Oertle,* removes any lingering doubt concerning whether there is a consistent position in the Tenth Circuit.[9]

It is also hardly clear that the two decisions from the Second Circuit cited by petitioner (Pet. 8) do, in fact, hold that the "alone" language is routinely required. In both *United States* v. *Minieri,* 303 F. 2d 550, 555 (2d Cir.), cert. denied, 371 U.S. 847 (1962), and *United States* v. *Cramer,* 447 F. 2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972), the district court's jury charges were upheld although neither contained the "alone" language petitioner here seeks. Indeed, in both cases the instruction given was

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[9]Similarly, it is hardly clear, as petitioner suggests (Pet. 8-9), that any decision within the D.C. Circuit requires the giving of an instruction that evidence of good character alone may be sufficient to raise a reasonable doubt. While several cases from that circuit have said in dictum that such an instruction is required, we have not found a single case within that circuit where a conviction was reversed for failure to include the "alone" language. See, *e.g., United States* v. *Lewis,* 482 F. 2d 632, 637 (D.C. Cir. 1973) (jury instruction not at issue); *United States* v. *Fox,* 473 F. 2d 131, 134-135 (D.C. Cir. 1972) (jury instruction not at issue); *United States* v. *Wooden,* 420 F. 2d 251, 253 (D.C. Cir. 1969) (jury instruction not at issue); *Colbert* v. *United States,* 146 F. 2d 10, 11 (D.C. Cir. 1944) (conviction reversed because of a failure to instruct at all on character evidence, not because the court failed to include in its charge the "alone" language).

Moreover, petitioner is incorrect in asserting (Pet. 9-10, 15) that there is a clear internal conflict within the Ninth Circuit. *Weedin* v. *United States,* 380 F. 2d 657 (9th Cir. 1967), does not disclose either the requested charge or the one actually given to the jury, and there is thus no basis for determining whether the instruction in that case conflicts with any other opinion from the circuit. Likewise, petitioner's suggestion (Pet. 8) of a possible conflict in the Fifth Circuit is unfounded. The court in *Darland* v. *United States,* 626 F. 2d 1235, 1237-1238 (5th Cir. 1980), consistent with the "in a proper case" language in *Michelson,* stated in dicta only that a defendant *may* be entitled to an "alone" charge.

upheld because it sufficiently explained the effect of character evidence and because, as the court of appeals noted here (Pet. App. 23a), the government's case was impressive. *United States* v. *Minieri, supra,* 303 F. 2d at 555; *United States* v. *Cramer, supra,* 447 F. 2d at 219. In *United States* v. *Crosby,* 294 F. 2d 928, 947-948 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962), and *United States* v. *Kabot,* 295 F. 2d 848, 855 (2d Cir. 1961), cert. denied, 369 U.S. 803 (1962), the court did not impose a requirement for an "alone" charge, but simply found no error in instructions given at trial that included such language.

Finally, although it appears, as petitioner contends (Pet. 8), that some decisions within the Seventh Circuit require the giving of the "alone" language, it is not clear that the Seventh Circuit invariably would require such an instruction. In *United States* v. *Wicoff,* 187 F. 2d 886, 890 (7th Cir. 1951), the court did say that evidence of good character may in itself be sufficient to create in the minds of the jury a reasonable doubt of defendant's guilt, but the court's reversal was based upon the fact that the district court told the jury it should consider the character evidence only if other evidence in the case left it in doubt. In *United States* v. *Donnelly,* 179 F. 2d 227, 233 (7th Cir. 1950), the court held that it was error for the trial court to refuse a request to instruct the jury that character evidence may in itself be sufficient to create a reasonable doubt, but it specifically noted that the outcome of that case depended largely upon the jury's relative appraisal of the credibility of the defendant, who testified on his own behalf, and the credibility of an accomplice, who testified for the government.

Upon examination, the conflict posed by petitioner is truly minor. The apparent divergence among the circuits does not warrant review by this Court. The rule of the great majority of courts—that, where the instruction otherwise clearly states the relationship between reputation evidence

and reasonable doubt, the court need not add that such evidence alone might create a reasonable doubt—does not affect such fundamental rights of the accused as to call for the exercise by this Court of its supervisory authority over the federal courts. A charge, such as the one given in this case, that character evidence must be *considered* with all the other evidence in the case implies that character evidence may alone raise a reasonable doubt, and therefore adequately guards against any miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-2155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Do the Supreme Court decisions in *Edgington v. United States* and *Michelson v. United States* require in a federal criminal trial an instruction that *character evidence when considered with all the other evidence in the case may alone raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

II. Is it error in a federal criminal trial for the District Court to fail to charge the jury as to the purpose, function and effect of character evidence upon the Government's burden of proof, specifically that *character evidence when considered with all the other evidence in the case may raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

III. Is it error in a federal criminal trial and a Denial of Due Process under the Fifth Amendment for the District Court to instruct the jury that character evidence may not defeat a finding of guilt beyond a reasonable doubt, without also instructing that character evidence when considered with all the other evidence in the case may also raise a reasonable doubt, when such a balanced instruction is requested by the defendant?

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No. 80-2155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

Irwin A. Schiff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals For The Second Circuit entered in this case on January 28, 1981.

PETITIONER'S REPLY

THERE CURRENTLY EXISTS A CONFLICT BOTH AMONG AND WITHIN THE FEDERAL CIRCUITS AS TO WHETHER THE "ALONE" CHARGE IS REQUIRED AND THE CONFLICT IS BASED UPON DIVERGENT OPINIONS AMONG AND WITHIN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF TWO SUPREME COURT DECISIONS.

At the outset the Government misstates that the "sole contention here is that the District Court erred in refusing to instruct the jury that character evidence may by itself raise a reasonable doubt in the minds of the jury". (Brief for the U.S. in Opp., p. 4). The Government ignores the fact that the District Court failed to charge as to the purpose, function and effect of character evidence - specifically that character evidence when considered with all the other evidence may raise a reasonable doubt, which the Government recognizes in its own brief is the required charge in those Circuits and by those panels which do not accept the "alone" charge (Brief for the U.S. in Opp., p. 5).

In fact, the District Court's charge did quite the contrary. Rather than charging that character evidence when considered with all the other evidence may raise a reasonable doubt, the District Court charged that character evidence could not defeat a finding of guilt beyond a reasonable doubt reversing the context of the "reasonable doubt" reference.

The Government attempts to paint a picture that there is no conflict among and within the Circuits by arguing the merits of one side of the split, and by ignoring the District Court's failure to meet even this standard, specifically, that character evidence when considered with all the other evidence may raise a reasonable doubt. Yet, the Government recognizes that this Question Presented has been raised no less than five times before — first in 1957 and the last in 1970 (Brief of the U.S. in Opp., pp. 4-5, n.5.). By raising it again in our Petition, this makes four decades that the federal bar has attempted to remove the discrimination which varies from Circuit to Circuit and District to District in a charge that arises in most criminal trials. The circuits remain split as to whether the Supreme Court's decisions in *Edgington v. United States*, 164 U.S. 361, 17 S.Ct. 72, 41 L.Ed. 467 (1896) and *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 S.Ct. 168, 93 L.Ed. 168 (1948) entitle a federal criminal defendant to a jury charge that character evidence when considered with all the other evidence may "alone" raise a reasonable doubt, or whether the required charge is simply that character evidence when considered with all the other evidence may raise a reasonable doubt. Neither was charged in petitioner's case.

The Government states that *Edgington* and *Michelson* do not require the "alone" charge, or any other character evidence instruction. However, the Courts of Appeals do not agree, and it is the split in their judgment which the petitioner requests this Court to review. The Government's belief as to the meaning of *Edgington* and *Michelson* is not the issue — rather it is the Circuits

interpretation of them which is the center of the conflict that has resulted in the egregious discriminatory charges currently received by federal criminal defendants, an issue which is the basis of our Petition, yet a concern which the Government does not address. While the Government attempts to iron out the conflict and the reliance upon these Supreme Court decisions, an examination of the cases in question establishes that the wrinkle is in fact a tear.

Although the Government cited *Oertle v. United States,* 370 F.2d 719 (1966) (en banc), *cert. denied,* 387 U.S. 943, 87 S.Ct. 2075, 18 L.Ed 2d 1329 (1966), in arguing their position that there is no conflict, the case itself, contrary to six earlier decisions in that Circuit including the en banc decisions in *Petersen v. United States,* 268 F.2d 87 (10th Cir. 1967) (en banc), candidly noted:

> The Supreme Court in Edgington v. United States (citation omitted) laid down the rule of law on this point the Circuit Courts have since sought to follow. It is significant that the Circuits have not been consistent in the interpretation of Edgington, and the later case Michelson v. United States (citation omitted) (footnote citation to "compilation of cases in Petersen v. United States" which establish the split in the Circuits on the Question Presented in 1959 is omitted, *Petersen v. United States, supra,* at 89,n.3).

This 10th Circuit case, cited by the Government, states that *Edgington* and *Michelson* are the basis for the required instruction as to character evidence, contrary to the Government's position, that the various Circuits have split in their interpretation of these decisions, contrary to the Government's position, and that this "inconsistency" among the Circuits is "significant", contrary to the Government's position and claim that the conflict is "truly minor" (Brief of the U.S. in Opp., p.9). Again, it is the Circuits view which is of concern, not the Government's.

The Government tries to cloud the position of two Second Circuit decisions, both which unquestionably hold that the "alone" charge is required, conflicting with other panel decisions in the Circuit. In *United States v. Minieri,* 303 F.2d 550, 554; 555, (2d Cir. 1962), *cert. denied,* 371 U.S. 847, 83 S.Ct. 79, 9 L.Ed 2d 8 (1962), the Court could have hardly been clearer in its language or in the source of its reliance:

> Indeed the defense may introduce evidence of the defendant's good reputation to show that it is improbable that he committed the crime charged. Edgington v. United States (citations omitted). And under certain circumstances that testimony alone may raise a reasonable doubt as to the defendant's guilt, *and in the federal courts the defendant is entitled to such an instruction.* Michelson v. United States, (citation omitted): Edgington v. United States. (emphasis ours). *Id.*at 555.

The Court then held because the defendant did not object to the District Court's failure to charge the "alone" instruction, and because it was charged that character evidence "may render the task of the Government a heavier one to prove guilt beyond a reasonable doubt", the plain error doctrine would not apply. In petitioner's case there was an objection, and more importantly the District Court did not reference character evidence with reasonable doubt and did not give an analagous charge to the *Minieri* instruction that such evidence might make the Government's burden of reasonable doubt heavier, an intimation of the "alone" charge.

In *United States v. Cramer,* 447 F.2d 210, 219 (2d Cir. 1971), the Second Circuit, citing *Minieri, supra,* again upheld the "alone" charge, with *Edgington* and *Michelson* the authority, stating that the appellants "were entitled to such an instruction". *Cramer, surpra,* at 219. Again, the Court did not reverse because the charge, which clearly referenced character evidence to the Court's burden of reasonable doubt, was sufficiently explanatory. In petitioner's case, the only reference to reasonable doubt was that character evidence could not defeat a finding of guilt beyond a reasonable doubt. The very opposite of the purpose, function and effect of character evidence and the charge as required by *Edgington* and *Michelson.*

Further the Second Circuit's clear holding in *Minieri* and *Cramer* are in open conflict with the Second Circuit's decisions in *United States v. Fayette,* 388 F. 2d 728, 737 (2d Cir. 1968) and *United States v. Lowenthal,*224 F.2d 248, 249 (2d Cir. 1955). The fact that the Second Circuit is unwilling to resolve the conflict within its own Circuit, or to even author a panel decision attempting to harmonize the split, is not a writ of prohibition to the Supreme Court to end the discriminatory treatment that federal criminal defendants have now received upon this charge, where the value of the character evidence is more often

determined by the location of the courthouse, that the quality of the evidence. *Edgington* was decided in 1896, and *Michelson* in 1948. It cannot be said a fair opportunity has not been afforded the Circuits.

There are four other Circuits which have decisions adopting the "alone" charge, relying upon the *Edgington-Michelson* authority. The 7th Circuit has held in *United States v. Donnelly*, 179 F.2d 227, 233 (1950) and *United States v. Wicoff*, 187 F.2d 886, 890 (1951), that the "alone" or "itself" charge is required by the Supreme Court's decision in *Edgington*. In the 9th Circuit, the Court in *Weedin v. United States*, 380 F.2d 657, 660 (1967), was clear in its position that *Michelson* requires the "alone" charge:

> We agree with Weedin that evidence of good character may be sufficient alone to create a reasonable doubt of guilt (Michelson v. United States (citation omitted)..*Ibid.*

The 10th Circuit has twice in two conflicting en banc decisions recognized the split among the federal circuits on the Question Presented, and that it revolves upon the varying interpretations of *Edgington* and *Michelson*. *Petersen v. United States, supra,* at 89; *Oertle v. United States, supra,* at 726. In the District of Columbia Circuit, the Circuit has held that *Michelson* and *Edgington* require the "alone" charge:

> The principles governing the use of character evidence in criminal trials in this circuit have been delineated in the past and need only brief summarization here . . . Good-character evidence may of itself raise a reasonable doubt as to guilt, and the accused is entitled to have the jury so instructed. (footnote citations to both Edgington and Michelson omitted). *United States v. Lewis*, 157 U.S. App. D.C. 43, 482 F.2d 632, 637 (1973).

Accord: *United States v. Wooden*, 137 U.S. App. D.C. 1, 420 F.2d 251, 253 (1969); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261, 263 (1950); *United States v. Colbert*, 79 U.S. App. D.C. 261, 146 F. 2d 10,11 (1944).

The result is that five Circuits have decisions which interpret the *Edgington*

and *Michelson* cases as requiring the "alone" charge.

Even those Circuits which reject the "alone" instruction and follow the alternate charge that character evidence when considered with all the other evidence may raise a reasonable doubt, which was not given at petitioner's trial, base the requirement on either *Edgington* or *Michelson* or both.

3rd Circuit: *United States v. Klass*, 166 F.2d 373, 378-380; *United States v. Frischling*, 160 F.2d 370 (1947); *United States v. Quick*, 128 F.2d 832, 835-837 (1942).

4th Circuit: *Mannix v. United States*, 140 F.2d 250, 253-254 (1944).

6th Circuit: *Poliafico v. United States*, 237 F.2d 97, 114 (1956), *cert. denied*, 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed. 2d 597 (1957), *rehearing denied*, 353 U.S. 931, 77 S.Ct. 718 1 L.Ed. 2d 725 (1957).

8th Circuit: *Sunderland v. United States*, 19 F.2d 202, 215 (1927); *Black v. United States*, 309 F.2d 331, 343-344 (1962), *cert. denied*, 372 U.S. 934, 83 S.Ct. 880, 9 L.Ed. 2d 765 (1963).

In three of the Circuits where there are clearly conflicting decisions, the 2d, 9th, and 10th (Petition for Writ of Cert., pp. 7-11), the conflict in each is based upon the varying interpretations by the panels as to the requirements of *Edgington* and *Michelson*.

2d Circuit:

FOR: *United States v. Minieri, supra*, at 554-555; *United States v. Cramer, supra*, at 219.

AGAINST: *United States v. Lowenthal, supra*, at 249.

9th Circuit:

FOR: *Weedin v. United States, supra*, at 660.

AGAINST: *Smith v. United States*, 305 F.2d 197, 205-207 (1962), *cert. denied sub nom., Corey v. United States*, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed. 2d 124 (1962).

10th Circuit:

FOR: *Petersen v. United States, supra*, at 88-89.

AGAINST: *Oertle v. United States, supra, 726-727.*

There is not only a clear conflict among the federal Circuits, but within several of them, and the basis for the division is the interpretation each Circuit and panel give to the requirements of the Supreme Court's decisions in *Edgington* and *Michelson*. The Government's veiled implications to the contrary, are completely unfounded as the very cases clearly demonstrate.

There are few areas of the law where there exists more division and confusion, and on a recurring federal question which potentially can arise at every federal criminal trial. At present, there is a real and harmful discrimination which results not simply from Circuit to Circuit, but even District to District and Judge to Judge as to the character evidence instruction required. A comparison of the charge given in petitioner's case, with that given in two other Second Circuit cases, *United States v. Kabot*, 295 F.2d 848, 855, n.1 (2d Cir. 1961), *cert. denied*, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed. 2d 550 (1961); and *United States v. Crosby*, 294 F.2d 928, 947-948, *cert. denied sub nom, Mittleman v. United States*, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed. 2d 523 (1961) (See Petition for Writ of Cert., Appendix, pp. 45a-46a), establish the depth and degree of the discimination. The success or failure of a federal criminal defendant in the federal courts should not to any degree be determined by the venue and the varying law of the courthouse. This is the heart of our Petition, and the essential reason why Supreme Court review is imperative on what amounts to a major split among and within the Circuits on an exceptionally important federal question, the resolution of which revolves around two very old Supreme Court decisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents 1) a recurring federal question dealing with the administration of federal criminal justice upon which the federal Circuits are severely divided, the resolution of which turns upon the interpretation of two decisions of this Court and 2) which involves an important question of federal law that can only be settled by this Court.

The Petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of

Appeals for the Second Circuit and that the Court summarily reverse the judgment of the Court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Respectfully submitted,

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